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February 8, 2005

Supplement to
AOR 2004-43

VIA E-MAIL AND COURIER

Ms. Rosemary C. Smith
Associate General Counsel
Federal Election Commission
Washington, D.C. 20463

Re: Erratum to letter of January 21, 2005

Dear Ms. Smith:

On January 21 2005, I sent you a letter responding to your request for information dated December 21, 2004. It has now come to my attention that a misstatement occurred in my letter. I would like to use this opportunity to correct the statement.

Your question 3 asked:

> *State whether there are any circumstances under which a member of MBA could offer the LUC to a Federal candidate, absent being required to do so under the Communications Act. Describe all such circumstances.*

In response, I quoted language which was attributed to the FCC rules and regulations by footnote 9. The statement was:

> The Equal Opportunities Doctrine of Section 315(a) of the Communications Act of 1934 requires that ". . . a licensee must treat all legally qualified candidates for the same office alike. It may make no discrimination in charges, practices, regulations, facilities or services . . . rendered . . . to any candidate for public office . . ."[9] Thus, a broadcaster cannot charge LUC or lower to a candidate for a particular public office and not offer the same charge to that candidate's opponents for the *same* office.

Footnote 9 referred to Section 47 CFR §73.1941(e). In fact the quoted language came from the Womble Carlyle Political Broadcasting Manual at page 11, a copy of which was attached to the January 21 letter. The Manual states:

VII. Equal Opportunities

What it Means

Equal opportunities mean that a licensee must treat all legally qualified candidates for the same office alike. It may make no discrimination in charges, practices, regulations, facilities or services rendered among legally qualified candidates for a particular office.

Although the quote is from the Womble Manual, it is nonetheless accurate and does reflect many pronouncements that have come from the FCC staff. The question raised is whether the Equal Opportunities Doctrine relates only to the question of access, or whether the Doctrine also relates to the question of cost equality between candidates. The actual language of Section §73.1941(e) of the rules states:

> (e) Discrimination between candidates. In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

Noticeably, the rule does not include fees or charges in its language. However, the term in subsection (e) "In making time available," is commonly considered to include the rate factor. Otherwise, as common sense dictates, broadcasters could "discriminate" between candidates by charging them different rates. In fact the FCC has made statements that support this conclusion. In its 1992 Memorandum Opinion and Order, the Commission stated, at paragraph 27:

> . . . stations remain under a duty to make advertising time available to candidates subject to the same rates terms and conditions as is made available to commercial advertisers.[1]

Admittedly, here it was talking only about comparing candidates to commercial advertisers and in the context of nondiscrimination as between candidates and other advertisers. Still, the implication is clear that the candidates are to be treated alike as to rates when compared to commercial advertisers.

More pointedly, in 1984, the Commission had occasion to clarify its intention and the meaning of its rules in a document it released titled its ***Political Primer***.[2] In attempting to clarify what equal opportunities is, the Commission resorted to also providing examples of what equal opportunities is not. At paragraph 55, it cited several examples, the fourth of which dealt with unequal rates, where it said:

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[1] ***Codification of the Commission's Political Programming Policies*** Memorandum and Order in MM Docket No. 91-168, Released June 11, 1992, 70 RR 2d 1331 7 FCC Rcd 4611 1992 FCC LEXIS 3226 at ¶27

[2] ***Political Primer***, 100 FCC 2d 1476, 1984 FCC LEXIS 2934 (January 1, 1984)

> (d) Unequal rates. Charging one of two opposing candidates a higher rate than the other violates the rules, as does letting one candidate combine his totals of 30 and 60 second spot announcements to arrive at a cumulative total entitling him to a discount which is denied his opponent. [107]
> [Citing: Station ***KAHU***, FCC 71-959; ***KAYS, Inc. (KFEQ)***, FCC 73-1121, reproduced as Appendix A]

The KAYS case makes clear that the stations were cited for violating equal opportunities because they charged different rates for political announcements of the same class and duration to legally qualified candidates for the same office. Thus we believe that the principle stated in the Womble Carlyle manual is correct, but apologize for the error in citation.

I hope that this information is helpful. I take special care to note that all of these citations are prior to the passage of the Bipartisan Campaign Reform Act (BCRA). I do not raise the matter here, or in my prior letter, to suggest that Section 315 and cases under it nullify BCRA, but to underscore the trap laid out by BCRA for broadcasters. Clearly, they must treat all similarly situated political candidates for the same office alike. However, if all BCRA did was to remove the entitlement to LUC, and does not mandate a new price level at which such candidates *must* be charged, then broadcasters should not be held liable for a failure to move these candidates to a new rate, provided that they treat similarly situated candidates alike.

If I can be of further help in clarifying this or any other matter, please do not hesitate to contact me.

Sincerely,

Gregg P. Skall
Counsel to the Missouri Broadcasters Association

cc: Robert Baker, Esq. Federal Communications Commission
Donald J. Simon, Esq. Counsel to Democracy 21, Campaign Legal Center and Center for Responsive Politics

NOTICE OF APPARENT LIABILITY FOR FORFEITURE TO ROYAL HAWAIIAN RADIO, INC., WAIPAHU, HAWAII

31 FCC 2d 779, 1971 FCC LEXIS 1624

(September 8, 1971)

FCC 71-959

NOTICE

GENTLEMEN: This letter constitutes Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

Station KAHU was inspected on February 25, 1971, and was thereafter issued an Official Notice of Violation for the following violations of Section 73.120(c) of the Commission's rules:

1. Vincent Yano and George Ariyoshi, candidates for the office of Lieutenant Governor, were not treated uniformly with regard to rates charged for political advertising. Station stated that all political candidates were charged per a special political rate card. Yano was charged in excess of the applicable rate card while Ariyoshi was charged less than the applicable rate.

Candidate	Broadcast date	Duration in seconds	Frequency in time	Spot rate charged
Yano	Sept. 30-Oct. 2, 1970	30	36	
Ariyoshi	Sept. 5-Oct. 2, 1970	60	45	4.40

Candidate:	Applicable rate (on rate card)
Yano	
Ariyoshi	4.75/per 60 second spot.

2. John Burns, candidate for the office of Governor, was not treated uniformly along with other candidates for the same office, Tom Gill and Sam King, with regard to rates charged for political advertising. (See specifically subpart (a) below.) Also, in five instances, Burns was charged a rate that exceeded the rate charged for comparable commercial advertising. (See specifically subpart (b) below.)

(a) Gill and King were allowed to combine 30 second and 60 second spots to arrive at a cumulative frequency total for which the rates were applied. Burns did not receive this privilege.

(b) Burns was charged in excess of the regular commercial rates in Nos. 6, 9, 13, 16 & 19 below. Top rate for commercial spots is $5.75 per spot for 1-12, 60 second announcements.

No.	Candidate	Date	Duration in seconds	Frequency in time
1	King	Oct. 14 to Nov. 2, 1970	30	75
			60	25
2	Gill	June 2 to June 4, 1970	30	9
3	Gill	Aug. 10 to Oct. 4, 1970	30	56
4	Gill	Sept. 10 to Oct. 2, 1970	30	115
5	Gill	Sept. 17 to Oct. 2, 1970	60	40
6	Burns	June 15 to July 4, 1970	60	36
7	Burns	July 20 to Aug. 9, 1970	30	36
8	Burns	Aug. 15, to Aug. 16, 1970	60	8
9	Burns	Aug. 14 to Oct. 2, 1970	60	28
10	Burns	Aug. 24 to Sept. 13, 1970	30	63
11	Burns	Sept. 4 to Sept. 10, 1970	60	14
12	Burns	Sept. 20 to Oct. 2, 1970	30	50
13	Burns	Sept. 19 to Oct. 2, 1970	60	14
14	Burns	Sept. 26 to Oct. 2, 1970	60	12
15	Burns	Oct. 11 to Oct. 13, 1970	60	6
16	Burns	Oct. 14 to Nov. 3, 1970	60	21
17	Burns	Oct. 21 to Oct. 27, 1970	60	25
18	Burns	Oct. 28 to Nov. 3, 1970	60	25
19	Burns	Oct. 28 to Nov. 3, 1970	60	7

No.	Cumulative frequency	Spot-rate charged	Applicable rate
1	100	$3.00	
		4.00	4.00
2	9	4.50	4.50
3	65	3.50	3.50
4	180	3.00	3.00
5	220	4.00	4.00
6	36	5.75	5.00
7	72	4.00	3.50
8	80	5.75	4.50
9	108	6.50	4.25
10	171	4.00	3.00
11	185	4.50	4.00
12	235	3.75	3.00
13	249	6.50	4.00
14	261	4.75	4.00
15	267	4.25	4.00
16	288	6.50	4.00
17	313	4.50	4.00
18	338	4.50	4.00
19	345	6.50	4.00

You have not denied that any of the violations cited above took place, but you state that, in each case, an advertising agency, and not the station, billed the candidates. You indicate that you were "lulled into a false sense of security" regarding the accuracy of the agencies' billing procedures but you have not disclaimed your "responsibility to review the contracts placed by the advertising agencies." You add that restitution "totaling $254.58 has been made to the agency which placed the orders for Governor Burns and $15.92 has been remitted to Mr. Yano."

We note that you have not commented upon the apparent violation of 73.120(c)(1) in connection with line 6 in part 2 above. Although you indicate that other instances for which you were cited for charging Mr. Burns more than commercial advertisers (9, 13, 16 and 19) were a result of the inadvertent use by the advertising agency of an inapplicable rate card, it appears that Mr. Burns with regard to lines 6, 9, 13, 16 and 19 was charged more than the rate charged at that time for commercial advertisements, contrary to 73.120(c)(1). [1]

You have stated further that items 7 and 8 under the citations relating to the rates charged Mr. Burns were "correctly billed." However, it appears that these items, as well as the other items relating to Mr. Burns' rates, violated Section 73.120(c)(2) since opposing candidates were allowed to combine 30 and 60 second spots for a "cumulative frequency" rate, but Mr. Burns was not. With regard to candidates Yano and Ariyoshi, Section 73.120(c)(2) was violated, even though "cumulative frequency" was not involved, since Mr. Yano was charged less and Mr. Ariyoshi was charged more than the applicable rate for each announcement.

We have considered your letter of April 21 and the fact that you have made restitution, and have determined that pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, you have incurred an apparent liability of five hundred dollars ($500) for willfully or repeatedly failing to observe the provisions of Section 73.120(c). This proceeding is confined to those violations occurring within one year preceding issuance of this Notice of Apparent Liability.

You are hereby notified that you have the opportunity to file with the Commission, within thirty (30) days of the date of the receipt of this Notice, a statement in writing as to why you should not be held liable, or, if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and any other information which you may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve you reduction or remission of the amount of liability. If it is unable to find that you should be relieved of liability, the Commission will issue an Order of Forfeiture and the forfeiture will be payable to the Treasurer of the United States.

If you do not file, within thirty (30) days of the date of receipt of this Notice, either a statement of non-liability or a statement setting forth facts and reasons why the forfeiture should be of a lesser amount, the Commission will enter an Order of Forfeiture in the amount of five hundred dollars ($500).

If you do not wish to file a statement which denies liability and, in addition, you do not wish to await the issuance of the Order, you may, within thirty (30) days of the date of the receipt of this letter, make payment of the forfeiture by mailing to the Commission a check, or similar instrument, in the amount of five hundred dollars ($500), drawn payable to the Treasurer of the United States.

BY DIRECTION OF THE COMMISSION, BEN F. WAPLE, Secretary.

End Notes

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1. You state that Items 9, 13, 16 and 19 "reflect the charge for political announcements given in the Filipino language," However, you state that the applicable translation charge was not used.

Notice of Apparent Liability for Forfeiture to KAYS, Inc., Hays, Kans.

43 FCC 2d 1183, 1973 FCC LEXIS 2200

(October 25, 1973)

FCC 73-1121

NOTICE

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

KAYS, INC., Radio Station KFEQ, Post Office Box 817, Hays, Kans. 67601

GENTLEMEN: This letter constitutes Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

Information obtained during a Commission field inquiry indicates that Station KFEQ charged different rates for political announcements of the same class and duration to legally qualified candidates for the same office before the Missouri general election of November 7, 1972. It appears that the different rates charged the following candidates constitute violations of the uniform rate provision of Section 73.120(c) of the Commission's Rules:

Candidate	Office	Inclusive dates	Length	Class	Net rate
Kirkpatrick	Sec. State	Oct. 26-Nov. 1	:30	ROS	
Kuelle	Sec. State	Oct. 30-Nov. 6	:30	ROS	2.55
Parker	Treasurer	Nov. 2-6	:30	ROS	2.55
Spainhower	Treasurer	Oct. 26-Nov. 6	:30	ROS	3.50

Your explanation is that Mr. Kirkpatrick's order was incorrectly computed by the agency and accepted by the station at $3.00 per announcement plus agency commission of 18.6 per cent. You explained that the rate given Mr. Spainhower was in error, possibly due to use of the wrong rate card. However, it is the licensee's responsibility to make sure that all charges for political announcements are in conformity with the Communications Act of 1934, as amended, and the Commission's Rules.

The field inquiry also revealed evidence of a contract for commercial advertising calling for 1,040 thirty-second ROS (Run-of-Schedule) commercial announcements at $2.20 per announcement scheduled between February 28, 1972 and February 24, 1973. Since this contract was in effect during the 60 days preceding the general election of November 7, 1972, it appears to establish the lowest unit charge of the station for the same class and amount of time for the same period where the legally qualified candidate uses his or her voice in the announcement. Thus, it appears from contracts and other documents found in the station's political file, that the following candidates were not afforded the lowest unit charge in the 30-second ROS rate classification:

Candidate	Office	Inclusive dates	Number	Net rate charged
Phelps	Lt. Gov	Oct. 26-Nov. 6	126	
Sloan	U.S. Rep	Oct. 31-Nov. 7	25	3.50
Danforth	Atty. Gen	Oct. 26-Nov. 6	68	2.97

Also found to be in effect during the 60 days preceding the November 7, 1972 general election was a contract for commercial advertising calling for a daily, 60-second commercial announcement at $3.60 per announcement in Class AA time, thereby establishing the lowest unit charge of the station for that class and amount of time for the same period. Thus, it appears the following candidates, whose voice was used in their announcements, were not afforded the lowest unit charge in the 60-second, AA time classification:

Candidate	Office	Inclusive dates	Number	Net rate charged
Bond	Gov	Oct. 28-Nov. 7	103	
McAttee	U.S. Rep	Nov. 1-Nov. 7	10	8.10
Cox	St. Rep	Nov. 3-Nov. 7	29	7.65

Further, there was a contract for political advertising in effect during the 60-day period preceding the general election that established the lowest unit charge for 60-second ROS announcements at $3.40 per announcement. Consequently, it appears that the following candidate, whose voice was used in his announcements, was not afforded the lowest unit charge for 60-second announcements in the ROS time classification:

Candidate	Office	Inclusive dates	Number	Net rate charged
Dowd	Gov	Oct. 27-Nov. 7	88	

Your explanation of the apparent failure to afford legally qualified candidates the lowest unit charge in the aforementioned classes and amount of time is that the station felt that these rates were not available to any other advertisers because of their long-term, continuous nature. However, we note that a similar situation was resolved in question and answer number 10 of the Commission's Public Notice of March 16, 1972 on the Use of Broadcast and Cablecast Facilities by candidates for Public Office, 34 FCC 2d 510. We note further, your intention to make restitution to the aforementioned candidates, but once again point out that this will not serve to excuse past violations. Executive Broadcasting Corp., 3 FCC 2d 699 (1966). Therefore, it appears that these charges made for the use of broadcast facilities to legally qualified candidates for public office during the 60 day period preceding a general election, constitute violations of the lowest unit charge provisions of Section 315(b)(1) of the Communications Act of 1934, as amended by the Federal Election Campaign Act of 1971 (Public Law 92-225).

Other information obtained during the field inquiry, including tape recordings of portions of KFEQ's broadcasts on January 5, 1973, indicates the licensee violated Section 73.112(a)(2) of the Commission's Rules pertaining to the proper keeping of program logs. The Commission has information to the effect that in October 1972, Mr. Gil LaPorte, KFEQ station manager, instructed station personnel to eliminate the commercial continuity (open and close) of certain programs from the computation of commercial matter shown on KFEQ's program logs. This resulted in the actual duration of commercial time (open and close plus one or more commercial announcements) to be in excess of that shown on the program logs in the following instances:

Time	Paogram	Sponsor
6:07 am	Farm Digest	Monsanto
6:18 am	What's New In Agriculture.	Farmland Industries
6:45 am	Livestock Market	PCA
6:55 am	Midwest Weather	Jenkins Tire
12:10 pm	Just Wondering'	Schreiber Mills
12:55 pm	Capt. Stubby	Allied Mills

Commercial time on 1/5/73

	Logged	Actual
6:07 am	60 sec	70 sec.
6:18 am	60 sec	85 sec.
6:45 am	60 sec	110 sec.
6:55 am	60 sec	80 sec.
12:10 pm	120 sec	177 sec.
12:55 pm	90 sec	105 sec.

We note the text of the commercial continuity went beyond mere mention of the sponsor's name. They included descriptive sentences or phrases that constituted measurable commercial time. It appears that this failure to log the total commercial content associated with these programs constitutes a willful violation of Section 73.112(a)(2) of the Commission's Rules.

We note that this is the initial forfeiture imposed under the lowest unit charge provision of Section 315(b)(1) of the Communications Act of 1934, as amended by the Federal Election Campaign Act of 1971. However, we consider this to be a serious matter that warrants substantial forfeitures. Moreover, with respect to the logging violations, in a similar case (WSER, Inc. FCC 69-242) where the station manager (not a principal in the licensee corporation) instructed station employees to make false entries in operating logs, the Commission imposed a $5,000 forfeiture.

We have considered the facts in this case and have determined that, pursuant to Section 503(b)(1)(B) of the Communications Act of 1934 as amended, you have incurred an apparent liability for forfeiture in the amount of $5,000 for willful or repeated violation of Section 315 (b)(1) of the Communications Act of 1934, as amended, and Sections 73.120(c) and 73.112(a)(2) of the Commission's Rules in the operation of Station KFEQ. The apparent liability recited herein is limited to those violations occurring within one year of the date of the issuance of this Notice.

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In this case you should mail to the Commission a check or similar instrument for $5,000 made payable to the Federal Communications Commission.

2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. The statement must be signed by the licensee; a partner, if the licensee is a partnership; by an officer, if the licensee is a corporation; or by a duly elected or appointed official, if an unincorporated association. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

Commissioner Robert E. Lee absent; Commissioners Reid and Hooks concurring in the result.

BY DIRECTION OF THE COMMISSION, VINCENT J. MULLINS, Secretary.